

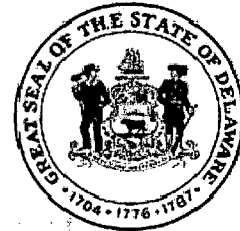
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**OFFICE OF THE PUBLIC DEFENDER**

LAWRENCE M. SULLIVAN, PUBLIC DEFENDER OF THE  
STATE OF DELAWARE



**COMPENDIUM OF RECENT CRIMINAL-LAW  
DECISIONS FROM THE DELAWARE SUPREME COURT**

**Cases Summarized and Compiled by  
Nicole M. Walker, Esquire and  
P. Ross A. Flockerzie, Law Clerk**

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**DELAWARE SUPREME COURT CASES  
APRIL 1, 2008 THROUGH JUNE 31, 2008**

**JEROME SULLINS: (4/2/08): EVIDENCE AT TRIAL OF POLICE  
SURVEILLANCE**



D was convicted of trafficking and PWITD heroin and cocaine. D was target of investigation wherein a controlled purchase between him and a confidential informant was set up in parking lot of a Ho-Ho Market. D left the scene and police followed him. A chase ensued and D threw drugs out the car window. The car was later abandoned and D was arrested as he attempted to enter a house. In the house, police found a digital scale, stamp kit and empty plastic baggies.

D and the State agreed to say only that police were at the scene on the day in question because of a surveillance investigation in general. D asked for a mistrial after the State said in its opening that police arrested D once he pulled into the parking lot because of police observations of D. The judge said any error was slight. Then, one officer used the word "transaction" in his testimony and another stated that D was under investigation. D did not object but later filed a motion which was denied. The judge found that the evidence was necessary background, not unfairly prejudicial, did not give jury information they could not otherwise infer and D's objections to the evidence was untimely. On appeal, the decision was affirmed.

**DICKENS V. STATE, (4/2/08): CONTINUANCE FOR MENTAL HEALTH  
EVALUATION; SELF DEFENSE INSTRUCTION**

D, an inmate at DCC, represented himself at trial. His charges stemmed from his complaints that his food was being tampered with. One day, he threw bodily fluids at one C.O. and did the same on another day to a different C.O. At trial, D denied the second incident but admitted to the fist. However, he claimed the first was the result of self defense because his food was unsanitary. D was found guilty of charges related to his conduct.

D later filed a motion for a new trial claiming he was unfairly prejudiced when the judge denied him a continuance so that he could obtain a mental health evaluation. He also claimed two jurors had a bias. This motion was denied.

On appeal, D raised various issues. Only two are addressed here. First, the Court found that the judge did not abuse his discretion when he denied the continuance. D's

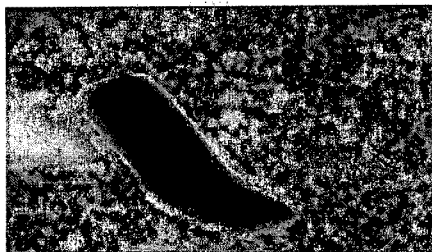
motion for a mental- health evaluation was made on the first day of trial, after he had months to prepare. Also, D had been given an option to be evaluated after trial to determine whether he was guilty, but mentally ill. D did not pursue this option. The Court also held that because D's actions against the C.O. were preemptive and not in response to immediate force, he was not entitled to a self-defense instruction.

#### **CARRIGAN V. STATE, (4/2/08): VOP HEARINGS/EX PARTE COMMUNICATION**

D was charged with and admitted to a violation of probation. Prior to sentencing, the judge told D and her attorney that, before the vop report was filed, he had run into the P.O. in the hall who told him that D was going to be violated. The P.O. was not at the hearing. D objected to the *ex parte* communication. D later filed a motion for a new trial and recusal. At the motion hearing, the P.O. testified as to what was said and revealed that another conversation occurred. The judge ruled that the conversations were permissible and denied the motion. On appeal, the Superior Court affirmed.

The Supreme Court then acknowledged that Delaware allows P.O.'s great law enforcement powers. However, the Court ruled that the communications were proper because they were made in the exercise of a P.O.'s duty to communicate to a sentencing judge. The Court did "emphasize that [it] do[es] not condone off-the-record communications by probation officers to the court on the merits of an alleged violation of probation." There should be a proper written record of the *ex parte* communication so that D has opportunity to be heard on the issue.

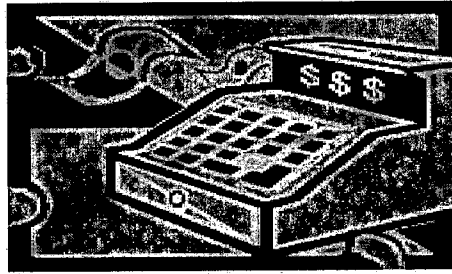
#### **LeGRANDE V. STATE, (4/22/08): ANONYMOUS TIPS**



An anonymous probationer provided his P.O. with D's identity, address, probationary status and identity of the occupant of another apartment at that address who was wanted. He also stated that there was specific contraband in the locked apartment. The P.O. assured the probationer that he would remain anonymous. P.O.'s and police went to the apartment which was locked. So they got a search warrant. Police had corroborated the accuracy of the address, probationary status and locked apartment. There was no confirmation of the occupant in separate apartment nor anything about the contraband allegedly in D's apartment.

On appeal, the Court held this was insufficient corroboration of an anonymous tip to establish the reliability of the anonymous tipster's assertion of illegality. The four corners of the affidavit did not establish probable cause. The evidence was sufficient to identify D but not to show the tipster had knowledge of concealed criminal activity by independent police work. Reversed and Remanded.

**CSEH V. STATE, (4/22/08): DANGEROUS INSTRUMENT; LESSER INCLUDED OFFENSE**



D went into a drug store, pulled out a sledgehammer and began waiving it. In a very loud and very angry tone he stated "open the register or I'll smash it." When the clerk said he could not open the drawer, D repeated his demand then beat the keyboard on the register 3 times and ran out the door. The clerk testified that he felt nervous, threatened, scared and hoped he would not end up the same way as the register. But, D never verbally threatened him.

At trial, because D did not threaten the clerk, D asked for instructions on the lesser included offenses of robbery first degree: robbery second degree, aggravating menacing and attempted theft. The judge denied the request finding that there was no evidence in the record to support that. D was found guilty of attempted robbery first degree and criminal mischief.

On appeal, D argued that the sledgehammer was not used "under the circumstances" as to render it readily capable of causing death or serious physical injury, thus it was not a dangerous instrument. The Court held that D did threaten the clerk when he brandished the sledgehammer over his head while demanding that he open the register. Thus, the judge's decision was affirmed.

**ANDREW BROWN V. STATE (4/23/08): SIXTH AMENDMENT RIGHT TO COUNSEL DURING INTERROGATION/JUVENILE**

In a previous decision, the Court ordered the matter be remanded for a more detailed evidentiary hearing with respect to D's 6<sup>th</sup> Amendment right to counsel. WPD went to New York where D, a juvenile, was apprehended on a murder charge. It was agreed by everyone, including the State, that police then unconstitutionally interrogated D. The matter was remanded for the trial court to make factual findings with respect to a statement made by D to NYPD a short period of time after the illegal interrogation. The concern was that the illegal interrogation by the WPD may have created a situation likely

to 'deliberately elicit' an incriminating response. On remand, the trial court found that there was no deliberate elicitation. The Court affirmed on appeal.

#### **PENNEWELL V. STATE, (4/24/08): EVIDENCE OF PRIOR DRUG DEALING**

After several telephone calls, police set up a drug buy. At an appointed place and time, D came up to the car and knocked on the window. An officer came out and announced himself. D took off but was eventually caught. Police found a cell phone and 3.15 grams of crack on the ground. The phone was the number police called earlier in the day. D made a statement that he made \$400 a week selling cocaine. At trial, d denied selling drugs and said he supplemented his income by selling t-shirts and other clothing. D was convicted of resisting arrest and PWITD of a narcotic substance.

On appeal, for the first time, D argued that court erred in failing to perform a *Getz* analysis prior to admitting evidence of prior drug dealing or giving a limiting instruction. Application of the *Getz* analysis shows that D's statement to police as to his source of income was admissible. It went to intent since he testified that he met buyer to sell clothes. The failure to give a limiting instruction when evidence of prior bad acts is admitted is generally not plain error. Because all other *Getz* factors were met and there was no timely objection, there was no plain error. Further, the State's statement in closing that D's nickname "Wonka" could be used to infer D sold cocaine as the original Wonka sold candy.

#### **MCDONALD V. STATE, (5/2/08): TURN SIGNALS/ARREST WARRANT**



Police saw a car, with a driver and front-seat passenger inside, legally parked at Shore Stop. There was a third person standing by the car. The officer saw nothing illegal. However, he ran the car's registration but accidentally transposed the digits. He determined that it was not registered when, in fact, it was. When the car left the parking lot and pulled onto a public road, it failed to signal. Based on his belief that this was illegal, the officer pulled the car over. In fact, it is not illegal to fail to signal when leaving a private property onto a public roadway.

After stopping the car, the officer asked the driver the name of his passenger. The driver did not identify D properly, he gave a different name. After finding drugs in the car and on D, the officer obtained an arrest warrant. Subsequently, D was convicted of trafficking cocaine and possession with intent to deliver.

The only probable cause for the initial stop that was asserted in the affidavit for the warrant was the alleged turn-signal traffic violation. However, in upholding the arrest, the judge erroneously relied on factors contained in the officer's testimony but not in the affidavit: high crime area, D's unprovoked flight and the registration issue. Thus, the judge erroneously went outside the four corners of the affidavit. On appeal, the Court reversed holding that but for the improper traffic stop, the officer would not have found drugs or arrested D. The decision was reversed. There was a dissent that opined that the officer's testimony should be considered and that his mistaken belief that the car was not properly registered was sufficient for the stop.

#### **STATE V. STURGIS, (5/6/08): COURT'S AUTHORITY TO REDUCE MANDATORY SENTENCE**

The State appealed trial court's reduction of D's minimum-mandatory Level 5 sentence for attempted murder first from 15 years to the 11 years and 6 months he had already served. D filed a motion requesting his sentence be reduced because his mother was ill and was no longer able to raise his three sons. The trial court deferred its decision until D set forth "demonstrations of extraordinary achievement in educational and parenting programs." D submitted another motion which was then granted. The court later denied the State's motion to correct the new sentence because of the "serious medical illness" of D's mother could override the minimum-mandatory term.

On appeal, the Court held that authority to reduce a sentence under Super.Ct.Rule 35 (b) does not provide authority to reduce or suspend the mandatory portion of a substantive statutory minimum sentence. Additionally, the trial court's reliance on 11 *Del.C.* § 4217 allowing for reduction of sentence when there is a serious medical illness was misplaced as the reduction can only be done upon application of DOC and does not apply to mom's health.

#### **STATE V. MEADES, (5/6/08): DETENTION/ 1902/ QUESTIONING**



After receiving a tip from someone who was not past proven and reliable, police saw d and a friend sitting on front steps of a house. At the hearing, police acknowledged tip not enough for stop. Police approached them and asked their names and whether they lived there. They gave them their names and admitted they did not live there. They also provided identification as requested. Both men consented to a pat down after they told police they had no contraband. Officer felt something on D, but did not remove it. The other officer ran D's name and learned he had a warrant. D was arrested and charged with PWITD and possession of cocaine within 1000' of a school.

On appeal, the State argued that D was not seized when police asked him his name. The State then argued in supplemental briefing that police had basis to stop due to loitering. The Court found that the State had ample time to argue that there was no detention under 11 *Del.C.* § 1902 but did not. The Court affirmed the trial court's grant of D's motion to suppress.

#### **JUSTICE V. STATE, (5/14/08): PREJUDICIAL ANSWERS AT TRIAL**

D was a DFS worker and V was in his custody. D picked her up from Delaware Guidance Services and they drove to a liquor store then to the Red Roof Inn. There they drank alcohol, smoked marijuana and allegedly had sex. D admitted that he bought alcohol while V was still in the car but he denied having sex with her.

At trial, the prosecutor asked the officer whether he researched D's date of birth. The officer answered that he looked it up through "DELJIS Automated Criminal Justice System." This gave a false impression that D had a criminal record. The prosecutor then asked, "And what is that?" D immediately objected and asked for a mistrial. The judge chastised the prosecutor, denied the mistrial but instructed the jury to disregard the answer. The officer informed the jury that he learned D's date of birth through his motor vehicle record. D was convicted of 2 counts of rape fourth degree, one count of EWOC and one count of Official Misconduct.

On appeal, the Court held that nothing indicated that the prosecutor knew what the detective's response would be. As to the prejudice sustained by the non-responsive answer, the Court held that the prejudice in potentially interjecting a false issue of criminal history was harmless beyond a reasonable doubt. A curative instruction was given immediately and the answer was clarified.

#### **KELLUM V. STATE, (5/16/08): LIO INSTRUCTIONS**



D hung out at a corner with V and V's brother. V sat on an electrical box. D and V had an argument over a woman and D pulled out a gun and shot V in the thigh. V fell to the ground and D shot him four more times. V lived and identified D twice from photo arrays, however, at trial, V denied D shot him. Also, V's brother failed to identify D at trial. D was charged with attempted murder first.

Over D's objection, the judge gave a lesser included offense instruction for assault first. D was acquitted of the attempted murder and found guilty of the assault first

degree. D appealed and the Court held that a rational trier of fact could conclude that D did not attempt to kill V. Because D chose not to shoot V in more vital areas, an attempt to cause serious physical injury could be inferred.

**MATHIS V. STATE, (5/19/08): PLAIN ERROR/UNTIMELY MOTIONS**

An employee at Burger King, V-1, heard someone say "give me the money" and "put the money in a bag." V-1 turned around and saw D wearing a gray hooded sweatshirt and jeans and waving a knife as he advanced toward her. V-1 put up her hands and watched D open the register and demand that she put money in bag. V-2 came in and D yelled at her to come over where he was, she did not. D chased V-2 with a knife and V-1 escaped to Denny's. Meanwhile BK's manager heard and watched the entire hullabaloo. Two W's on the road identified D's license plate number and description of his truck. The truck was registered to D's girlfriend. D was later arrested and taken to BK for V's to identify him. The manager was told to close the store "because they were bringing in the person that they had caught." D denied the robbery. D was found guilty of 2 counts of robbery first and 2 counts of PDWDCF.

D did not raise insufficiency of the evidence claim below. No plain error. The trial court denied D's untimely motion to suppress the out of court identification. D argued that he did not know the scope of the suggestiveness of the show up since none of the discovery materials indicated that V's spoke only Spanish. State said D had the information. On appeal, the Court found no abuse of discretion in denying the motion.

**DABNEY V. STATE, (decided 3/10/08; revised 5/23/08): SPEEDY TRIAL/ DNA DISCOVERY**

D was arrested on November 21, 2005 for taking pictures of his naked daughter holding a vibrator. D made a discovery request December 12<sup>th</sup>. On January 9, 2006, he was indicted on several sex offenses including rape second degree. D was then arraigned on January 17<sup>th</sup> and his trial was scheduled for April 6<sup>th</sup>. However, for a reason not reflected in the record, the trial was rescheduled to June 13<sup>th</sup>. In the interim, D was reindicted on all charges plus 3 additional charges.

The State failed to send DNA for testing until March 1<sup>st</sup>. On May 17<sup>th</sup>, State requested a continuance based, in part, on incomplete DNA analysis. While D objected to the request, the court granted it. However, it held that the new July 13<sup>th</sup> date was firm and any further continuance "would be inappropriate and unreasonable" unless D was released from custody. On June 2<sup>nd</sup>, the State provided a DNA report which did not contain any statistical analysis as is required by 11 *Del.C.* § 3515. Therefore, D made a follow-up request for the statistics. Because the statistics were never received, D filed motion in *limine* to exclude DNA evidence based on a claim of a discovery violation.

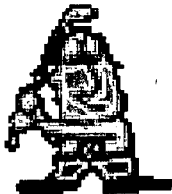
At trial, a prosecutor who had "just picked up the case" told the court that the State had been sandbagged by D's motion, statistics were not required and there was a need for a *Daubert* hearing. The court granted a continuance for the hearing to be

conducted. Shortly thereafter, the State provided D with the statistics along with an argument that the statistics were not required for the State to present DNA evidence to the jury. The State made no follow-up request for a *Daubert* hearing and none was conducted. Instead the court denied D's motion, found there to be no bad faith by the State and held that there was no speedy trial violation.

On appeal, the Supreme Court found the one year length of delay to be presumptively prejudicial based on Superior Court guidelines and case law. It also found that D asserted his speedy trial rights. The State conceded that it caused most, if not all, of the delays. The State also conceded, and the Court found, that DNA evidence was not necessary for the prosecution of the case. The Court concluded that the prosecutor's request for a *Daubert* hearing was "spurious" and that the claim that D sandbagged the State with its motion was "unfair." Any arguments against production of the statistics should have been made in response to the discovery request and not made unilaterally by the State.

The law is very clear with respect to the remedy for speedy trial violations - the entire indictment is to be dismissed. However, due to the nature of the charges, D's admission to all but the rape offense and strategic reasons, D provided the Court with the option of dismissing only the rape charge. That is what the Court did without citing any case law.

Later, the State filed a motion for reargument asking for the opportunity to supplement the record. The Court denied the motion finding that the State was simply asking for a "mulligan."



#### **JOHNSON V. STATE, (5/28/08): PRIOR CONVICTIONS**

It was alleged that D raped his 7 year-old daughter one night on the couch at her grandmother's house. D insisted he was at the next door neighbor's house at the time of the alleged rape. Five months later, V learned what the word "rape" meant and told her mom that D had raped her. Before trial, the prosecutor said he would impeach D on his prior felonies of robbery and PWITD. The trial court deferred decision until D decided to testify. Later, it failed to conduct any 609(a) balancing test before the State's cross examination and D did not object to subsequent questioning on his drug conviction. D used the word "trafficking" to characterize his PWITD. State never mentioned it again and the jury was given a cautionary instruction. D was convicted and sentenced to life.

On appeal, the Court noted that the word "trafficking" could lead jury to believe pattern of drug sales. However, there was no plain error as the questioning was brief and referred only to the drug conviction. In fact, the prosecutor corrected D's harmful characterization of "trafficking." Even if, *arguendo*, the jury improperly inferred that D had a propensity to sell drugs or to engage in criminal conduct, the error was harmless because credibility and not drugs was the issue at trial.

#### **WINER V. STATE, (6/10/08): INSUFFICIENCY OF THE EVIDENCE/JOINDER OF OFFENSES**



D was charged with arson first degree for allegedly causing a fire at the company where he worked. There was a dispute at trial as to whether D was disgruntled with respect to his job. Around 5:00 p.m. just prior to the start of his vacation, he, not unusually, returned to the office building from his job in the field to check his mail. He was then seen by another employee standing out front of the building with the bottoms of his pants wet. D denied having started a fire in the building.

It was discovered that there had been a fire in a locked human resource office of a woman with whom he supposedly had a problem. However, she testified that she had locked the door to her office on her way out that night and prior to D arriving at the building. There was also testimony that only a few people had keys to her office and all of the keys were accounted for by the firemen.

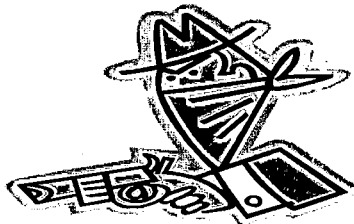
Later, after he was arrested, he was caught on tape causing damage to a jail cell. He was charged with criminal mischief under \$1,000 for this conduct. Prior to trial, D requested that this charge be severed from the arson charge. He argued that the conduct that was captured on video tape, and which D conceded, was unduly prejudicial to his arson charge. They were unrelated and not necessary for identification. This motion was denied. At the conclusion of the State's case, D moved for judgment of acquittal on the arson offense as the State failed to establish that D had access to the office where the fire originated. This motion was denied and D was convicted of arson third degree and criminal mischief.

On appeal, the Court concluded that the circumstantial evidence that D "intentionally started a fire," was weak but it was sufficient to survive a judgment of acquittal. Employees placed him at the scene right after the fire started; D acted odd; he gave inconsistent statements; a lighter was found on D; and the fire marshal said the fire was started by open flame, consistent with a lighter. The Court then held that "[i]n light

of the evidence presented, even if [the] office door was locked and all the keys were accounted for, that alone would not create a reasonable doubt as to Winer's guilt."

The Court also held that there was no error in denying D's severance motion because arson and criminal mischief are similar in character. Also, D was escorted directly from the scene to the jail cell, thus, the offenses were connected together by temporal proximity. The Court found that the jury did not infer that D had a general criminal disposition because he was convicted of the lesser rather than the greater arson offense. Finally, while the State's argument that the tape of the criminal mischief showed a general disposition for dishonesty, it was not plain error.

**WILSON V. STATE, (6/10/08): EVIDENCE OF PLEA AGREEMENTS/  
DISCOVERY/GETZ/3507**



Within days of each other, there were two robberies at one Speedy Mart. The identity of each of the robbers was different. However, after the second robbery, the store clerk saw D cross the street with another male who resembled the guy from the first robbery. Through subsequent identification, it was determined that the Co-D was involved in the first robbery and D in the second. Two blue handkerchiefs and three air pistols were found in an apartment where the two had stayed. Co-d gave statement implicating them both, took a plea and testified at D's trial. Over D's objection a redacted version of Co-d's plea agreement was entered into evidence. It did not contain the State's sentence recommendation. D convicted of 2 counts each of robbery 1<sup>st</sup>/wearing a disguise/consp.2.

On appeal, the Court found reversible error in the admission of the redacted versus an un-redacted plea agreement. The magnitude of the recommended sentence could significantly impact a jury's impression of Co-D's credibility. Because Co-D was an accomplice and, thus, a key witness, credibility was essential. Therefore, the error was not harmless. Also, there was no plain error when the prosecutor mentioned a photo line up that it had not provided to the defense. D did not ask for either a curative instruction or a mistrial. At trial, there were facts introduced that D robbed the store based, in part, on his drug use. The trial court erred when it did not make a complete Getz analysis or limiting instruction. However, it did not amount to plain error. Finally, there was no error for police to summarize the statements of the clerk and the Co-D because they were admissible under 11 Del.C. § 3507. Thus, it was admissible hearsay.

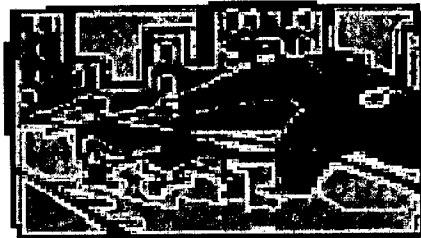
## **BURRELL V. STATE (JUNE 17, 2008): FELONY MURDER/POST-CONVICTION RELIEF/JURY INSTRUCTION**

D entered V's trailer home with a backpack and gun in order to take money from a safe. He hit V in the face with the gun. He then dragged V into a bedroom to get her to show him where the money was kept. She then began emptying the safe into a bag. At some point the weapon discharged and V was killed. D contended the shooting was an accident as he did not intend to shoot V. He also stated that he did not know there were bullets in the gun. D was convicted of felony murder and other related offenses.

On appeal, D argued he should not have been found guilty of felony murder because the murder did not happen "in furtherance of" the felonious robbery, it was an accident. The Supreme Court affirmed the conviction holding that a reckless killing that occurs when "trying to neutralize someone who is in a position to prevent a robbery is conduct in furtherance of the robbery objective."

D also argued the felony murder jury instruction was improper because it did not match the relevant portion of the *Delaware Code* exactly. The Code at the time stated: "in the course of and in furtherance of the commission...of a felony..." The jury instruction stated: "the killing was in furtherance of or *was intended to assist* in the commission of the felony..." D contends the language "to assist" improperly inserted into the jury instruction allows for conviction under broader factual circumstances than does "in furtherance of." In affirming, the Court explained that the semantic difference was insignificant as it correctly stated the law and allowed the jury to perform its duty.

## **BLAKE V. STATE (JUNE 24, 2008): EMERGENCY EXCEPTION DOCTRINE**



WPD and NYPD knocked on D's apartment in NYC regarding a shooting in NYC and charges in Delaware. Police heard footsteps and a muffled baby's cry. At one point there was a scream from the baby and a "boom." D fled and was apprehended two blocks away. Police, without a search warrant, entered the apartment and found the baby they were looking for. Police further looked in the apartment conducting a safety sweep and found a small amount of crack and other paraphernalia near the infant. They then obtained a search warrant. As a result of items found, D was convicted in Delaware of aggravated menacing as well as various weapons and drug charges.

On appeal, D argued the evidence obtained as a result of the initial warrantless entry should be suppressed. In affirming, the Court held that the entry fell under the emergency doctrine exception to the Fourth Amendment, thus, the subsequent safety search and search pursuant to a later obtained warrant were lawful. The entry satisfied the three-part *Guerreri* test: (1) police must have reasonable grounds to believe there is an emergency at hand and an immediate need for their assistance for the protection of life or property; (2) the search must not be primarily motivated by intent to arrest and seize evidence; and (3) there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.

#### **CHAVOUS V. STATE (JUNE 26, 2008): PLEA WITHDRAWAL**

A jury hung on D's robbery charges at trial. D subsequently pled guilty to robbery in exchange for the State dropping the remaining charges and recommending the minimum sentence of four years. While a PSI was being conducted, and D was still represented by counsel, D filed a *pro se* motion to withdraw his guilty plea claiming he was under threat, coercion, and distress when he entered into the agreement. At sentencing, D stated he wanted to go to trial on the remaining charges. The State thought D breached the agreement and recommended more than the minimum sentence. The trial judge sentenced D to the minimum sentence.

On appeal, D argued his motion to withdraw his plea should have been granted because the State did not recommend the minimum sentence per the agreement. In affirming, the Court explained that D received the benefit of the agreement because he was sentenced to four years. The Court further explained that D's *pro se* motion, while represented by counsel, was a legal nullity and the State should not have concluded D breached as that determination is for the Court.